1998

The State of Utah v. Philip E. Hollen : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	
PHILIP E. HOLLEN,	:	Case No. 980128-CA Priority No. 2
Defendant/Appellant.	:	

REPLY BRIEF OF APPELLANT

Appeal from a judgment of conviction for one count of Aggravated Robbery, a first degree felony in violation of Utah Code Ann. § 76-6-302 (1995), with firearm enhancement, and two counts of Aggravated Assault, a third degree felony in violation of Utah Code Ann. § 76-5-103 (Supp. 1998), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Sandra Peuler, Judge, presiding.

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ARGUMENT

I. THE ISSUE CONCERNING SUFFICIENCY OF THE EVIDENCE WAS ADEQUATELY PRESERVED FOR APPEAL.

The State initially contends that Hollen's argument on appeal concerning the insufficiency of the evidence for the aggravated burglary charge was not "specifically" argued below and is therefore not preserved. See State's Brief ("S.B.") at 11-14. To this end, the State asserts that the issue raised on appeal actually presents a legal question regarding whether "a 'taking' of property necessitates that the actor take physical possession,'" as opposed to a factual question going to the sufficiency of the evidence. S.B.11. The State's argument is unfounded.

As an initial matter, Hollen properly argued the issue below and therefore preserved the issue for appeal. In its brief, the State points to Hollen's choice of words in arguing that his challenge was too general to be preserved. S.B.14. In particular, the State notes that Hollen, in challenging the aggravated robbery charge, stated only that it "[l]ack[ed] [] prima facie evidence."

In arguing that Hollen's phraseology is not specific, the State unduly focuses on semantics and misses the content of the

objection. Rule 103(a)(1) of the Utah Rules of Evidence (1998) requires a moving party to make a "timely objection or motion, stating the specific ground of objection, *if the objection was not apparent from the context*." The sole purpose behind Rule 103(a)(1) is so that "the trial court has the first opportunity to address a claim that it erred. If the trial court already has had that opportunity, the justification for rigid waiver requirements is weakened considerably." State v. Johnson, 821 P.2d 1150, 1161 (Utah 1991).

In the present case, Hollen's objection as articulated meets the requirements of Rule 103(a)(1). First, the objection was timely raised immediately after all parties rested and before the jury went into deliberation during a period specifically reserved by the trial court for such motions. R.462[73].

In addition, the motion and its substance as articulated by Hollen was both clear on its face and apparent from the context of the argument. As to facial clarity, Black's Law Dictionary defines "prima facie" evidence as "[e]vidence good and sufficient on its face . . . [which], in the judgment of the law, is sufficient to establish a given fact, or the group or chain of facts constituting the [prosecution's] claim." Black's Law Dictionary 1190 (6th ed. 1990). While Hollen's choice of words may not have been common, (i.e., "the charge fails for insufficient evidence), the meaning of the phrase he used *by definition* clearly communicates the substance of the challenge - the evidence presented by the state "on its

face" is not "sufficient to establish . . . [the] facts constituting the [prosecution's] claim." Id.

Yet, even if Hollen's argument was not facially clear, it was nonetheless apparent from its context. The very definition of "prima facie evidence" notwithstanding, the court made its ruling on Hollen's challenge after Hollen and counsel for the codefendant made several other sufficiency challenges to the attempted homicide charges (counts two and three) and the aggravated kidnaping charges (counts four through seven). R.462[73-84]. After addressing at length the challenges to the attempted homicide and aggravated kidnaping charges, the court addressed the sufficiency challenge concerning the aggravated robbery charge (count one). R.462[84-87]. In this context, it is disingenuous for the State to assert that Hollen's sufficiency challenge concerning the aggravated robbery charge was not adequately specific for purposes of preservation.

In fact, it is evident from the record that the court understood the substance of the challenge to the extent that addressed the claim on its merits; the court stated, "[t]hat motion is denied . . . as to count one." R.462[87]. Nonetheless, the State notes that the court invited counsel for the codefendant to "elaborate" upon the motion, suggesting that the court itself was not clear on the substance of the challenge. S.B.14. Read in context, the court's invitation to co-counsel seems to derive not from a misunderstanding of the motion on the court's part, but from its abundance of caution in allowing the moving parties (Hollen and

the codefendant) to put everything on the record that they felt necessary. Consequently, contrary to the State's suggestion, the mere fact that the trial asked co-counsel if he had "[a]nything else to add relative to [the sufficiency challenge concerning the aggravated robbery charge]" does not imply a lack of specificity for purposes of preservation. Indeed, the court here had the "first opportunity" to address the challenge and, therefore, the "rigid waiver requirement" called for by the State is not necessitated here. Johnson, 821 P.2d at 1161.

In addition to the foregoing, the State asserts that Hollen misapprehends the real issue on appeal. S.B.10. The State argues that the real issue is a legal question concerning whether the "'taking' of property necessitates the actor take physical possession." S.B.11. The State also suggests that the argument Hollen should have made is that the information did not provide adequate notice of the charge against him. S.B.12. According to the State, therefore, Hollen waives his argument on appeal since he did not make the argument as framed by the State in the trial court below. Id. The State is incorrect.

Contrary to the State's assertion, Hollen's argument is one of statutory construction which hinges on the facts of the case as they apply to the aggravated robbery charge as set forth in the information. Utah's robbery statute, Utah Code Ann. § 76-6-301 (Supp. 1997), provides two distinct provisions for securing a robbery conviction: either thru the (1) actual "tak[ing]" of property or (2) the "attempt[ed] [] tak[ing]" of property by use of

force or fear from another's person or their presence. In this case, the State charged aggravated robbery, and likewise instructed the jury, based only on the theory that Hollen "took" property of the Million Dollar Saloon. R.10 (information);282-83 (jury instruction). The State neither charged nor instructed the jury on the "attempt[] to take" provision. Id.

Hence, the question becomes, as timely argued by Hollen at trial, R.462[86-87]; see also supra, and in his opening brief, see Appellant's Brief ("A.B.") at 7-11, whether the evidence presented by the State at trial was sufficient to establish the element of the offense as charged, i.e., whether Hollen "took" personal property belonging to the Million Dollar Saloon.[1]

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[1] Based on its position that Hollen's argument should have been framed in terms of inadequate notice provided in the information, the State also argues that Hollen's appeal is not appropriately preserved since he did not present such an issue "by written pretrial motion." S.B.12 (citing State v. Fulton, 742 P.2d 1208, 1215 (Utah 1987); State v. Pierce, 782 P.2d 194, 195 (Utah App. 1989)).

The State's argument is meritless for several reasons. First, as discussed above, Hollen's argument was properly and timely presented as a sufficiency of the evidence challenge. Moreover, the challenge was made orally at trial in accord with Utah R. Crim. P. 12(b) (1998), which provides that "[a] motion other than one made during a trial or hearing shall be in writing."

In light of the foregoing, the cases relied on by the State are inapposite here for they concern challenges to the adequacy of an information, which must be raised "before trial by written motion." Fulton, 742 P.2d at 1215 (citing Utah R. Crim. P. 12(b)(1), requiring "objections based on defects in the . . . information" to be raised five days before trial); see also Pierce, 782 P.2d at 195.

Accordingly, contrary to the State's assertion, Hollen has not waived his argument on appeal simply because he did not present a written, pre-trial motion. He was not required to do so and instead raised an appropriate and timely oral motion during trial.

In sum, Hollen raised his sufficiency challenge in accord with all the dictates of Rule 103(a)(1), and the trial court was consequently afforded the opportunity to address the challenge. Moreover, Hollen appropriately framed the argument in terms of sufficiency of the evidence. Accordingly, the State's waiver argument is meritless.[2]

II. THE STATE DID NOT MEET ITS BURDEN OF PROOF IN FAILING TO ESTABLISH THAT HOLLEN "TOOK" PROPERTY BELONGING TO THE MILLION DOLLAR SALOON.

The State never directly responds to Hollen's argument on appeal, namely the insufficiency of the evidence. Specifically, the State does not explain how the evidence establishes that Hollen "took" property from the Million Dollar Saloon when he never physically touched the money.

Instead, the State engages in a number of arguments, none of which were raised by Hollen on appeal, that only peripherally touch on Hollen's insufficiency challenge. First, the State asserts that a "taking" may be proved by evidence of either an attempted or completed taking, and therefore the State met its burden of proof where the facts established that Hollen attempted to take the money from the Million Dollar Saloon while holding the Saloon manager at gunpoint. S.B.15-21.

The State's argument does not stand since the prosecutor below never charged the version of aggravated robbery upon which the

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[2] The State argues as a final matter regarding preservation that Hollen did not establish manifest injustice, plain error or exceptional circumstances. In response, Hollen submits on his brief discussing plain error. A.B.2-4.

State now seeks affirmance. Rather, the State elected to pursue one of two distinct theories of robbery, i.e., that Hollen "took personal property in possession of Million Dollar Saloon." R.10. Noticeably absent from the information is the alternative theory of robbery under Utah law, namely that a person commits robbery if he "attempts to take" the personal property of another. Utah Code Ann. §§ 76-6-301 (Supp. 1998) and -302 (1995). Hollen was subsequently bound over on this theory alone and accordingly prepared his defense for trial.

Hence, to affirm the conviction where the State did not establish a "taking" based on an alternate theory of robbery not charged by the State would be a violation of his right of due process, Utah Const. Art. I, §7 (general due process); United States Const. amend. XIV (same), and more specifically, a violation of his right to be apprised of the accusation against him and to have a copy thereof. See Utah Const. Art. I, § 12 (securing right to be informed about charge); Utah Const. Art. I, § 13 ("[o]ffenses . . . shall be prosecuted by information"); U.S. Const. amend. VI ("accused shall enjoy the right . . . to be informed of the nature and cause of the accusation"); State v. Fulton, 742 P.2d 1208 (Utah 1987), cert. denied, 484 U.S. 1044, 108 S.Ct. 777, 98 L.Ed.2d 864 (1988) (notice implicates defendant's rights of due process and right to be informed of nature of charge).

Moreover, the State cannot now seek to justify the conviction on appeal by arguing that the "take" language that it itself elected to charge contemplates an "attempt to take" as well. As

noted above, Utah's robbery statute includes two distinct provisions for securing a conviction, either through evidence establishing a taking or an attempt to take. The latter provision was added by the Utah legislature in 1995. Prior to that, Utah's robbery statute read simply, "[r]obbery is the unlawful and intentional taking of personal property." Utah Code Ann. § 76-6-301(1) (1995). Under that statute, the State had to prove a taking and asportation in order to secure a robbery conviction. See, e.g., State v. Roberts, 518 P.2d 1246 (Utah 1974).

In this instance, the State likewise had to prove a taking and asportation in order to meet its burden of proof for the version of the aggravated robbery charge asserted against Hollen. However, the State failed to do so inasmuch as it never produced evidence that Hollen had any physical contact with the money from the Million Dollar Saloon. A.B.10 (discussing insufficiency of evidence). Where the State failed both to meet its burden of proof and to amend the information to include the "attempts to take" language, the conviction necessarily fails for insufficient evidence. Id.

The State alternatively suggests that the conviction should stand on the basis that Hollen had notice of the "attempts to take" provision notwithstanding the fact that it was never included in the information or that he was not bound based on such provision. S.B.21-24. Along this same vein, the State also notes that the jury instructions, "taken as a whole, fully and accurately informed the jury of the statutory elements" of aggravated robbery,

including the attempt language. S.B.25-26.

As an initial matter, Hollen does not argue adequacy of the information and notice. Rather, his argument on appeal concerns the insufficiency of the information in support of the aggravated robbery conviction as charged in the information. A.B.7-11. Indeed, Hollen is of the position that he had adequate notice of the distinct theory of aggravated robbery that the State unsuccessfully sought to prove at trial. The State's attempt, therefore, to set up a straw man on appeal and then pull it down is disingenuous and avoids the real issue at hand.

Nonetheless, even assuming the State's notice argument did have some bearing on the sufficiency issue, it does not merit affirmance here. As noted above, the robbery statute contains two distinct provisions from which a conviction can be secured, either through an actual taking or an attempt to take. The State gave notice by filing the information that it would proceed on the theory that Hollen "took" the property of the Million Dollar Saloon. R.10 (information). Thinking that he understood the aggravated robbery charge against him, and with no apparent defects or gaps in the information, Hollen prepared his defense accordingly.

The question then becomes whether the information was "constitutionally adequate" under the circumstances. See State v. Wilcox, 808 P.2d 1028, 1032 (Utah 1991). "The right to adequate notice in the Utah Constitution requires the prosecution to state the charge with sufficient specificity to protect the defendant

from multiple prosecutions for the same crime and to give notice sufficient for the one charged to prepare a defense." Id. In the present case, the aggravated robbery conviction cannot be affirmed upon an attempt theory because the State did not "charge [that theory of the case] with sufficient specificity." Id.; see supra (noting that attempt theory of robbery is distinct from an actual taking theory). Therefore, Hollen did not have an adequate opportunity to defend himself. Id.

In this manner, the present case is distinguishable from State v. Montoya, 910 P.2d 441, 446 (Utah App. 1996), wherein this court affirmed an incest conviction, in part, on the basis that it was properly charged in the information. In that case, the State did not include certain portions of the statutory language defining incest. Id. Nonetheless, this Court held that all "the elements of the offense" were properly alleged since the omitted statutory language did not "constitute a discrete element of the crime of incest." Id.

In the case at bar, by contrast, the "attempts to take" language omitted from the information did constitute a "discrete element" of aggravated robbery. Id. Hence, all the elements of the aggravated robbery charge upon which the State seeks affirmance were not included in the information. Therefore, to affirm the conviction on that basis would amount to a violation of Hollen's rights under the Utah and federal constitutions. See Utah Const. Art. I, § 7 (general due process); Art. I, § 12 ("the accused shall have the right . . . to demand the nature and cause of the

accusation against him, [and] to have a copy thereof"); Utah Const. Art. I, 13 ("[o]ffenses shall be prosecuted by information"); U.S. Const. amend. VI (securing right to be informed of the nature and cause of charge).

That the jury was instructed as to the alternate "attempts to take" robbery theory does not cure the constitutional problems with affirmance in this case. S.B.25-26. Again, Hollen was informed as to one theory of the aggravated robbery charge, bound over on that charge, and presented his defense accordingly. Informing the jury at the end of Hollen's trial as to the alternate attempt theory does not fulfill the constitutional notice requirements because Hollen had already prepared and presented his defense. Hence, the State's argument concerning the jury instructions is unavailing.

As a final matter, the State asserts that the conviction should be affirmed on the basis of invited error. S.B.26-27. Again, the State's argument is without merit. The doctrine of invited error applies only when a party intentionally misleads a court into error then complains of it on appeal. See State v. Dunn, 850 P.2d 1201, 1220 (Utah 1993).

Contrary to the State's unfounded allegation in its brief, Hollen did not intentionally mislead the court into error by consciously omitting to raise the court's attention to the absence of the "attempts to take" language in the information. S.B.27. As noted above, Hollen proceeded to defend his case based on the theory of the aggravated robbery charge as set forth in the information. He argued before the court and to the jury that the

State failed to show that he "took" property belonging to the Million Dollar Saloon. R.462[86-87,132]. Such above-board dealings with the court can hardly be classified as a strategic and manipulative intent on Hollen's part to "preserve a hidden ground for reversal on appeal." Dunn, 850 P.2d at 1220; cf., State v. Bullock, 791 P.2d 155, 159 (Utah 1989) ("[d]efendants are [] not entitled to both the benefit of not objecting at trial and the benefit of objecting on appeal;" defendant strategically raised only a few evidentiary objections at trial but challenged admissibility of almost all evidence on appeal). Hence, the State's claim of invited error is unfounded and does not preclude reversal in this case.

In light of the foregoing and the argument set forth in Hollen's opening brief, the aggravated robbery conviction is not supported by the evidence presented by the State at trial.

CONCLUSION

Hollen respectfully requests this Court to reverse the aggravated robbery conviction for insufficient evidence.

ORAL ARGUMENT

Appellant requests oral argument.

SUBMITTED this 22nd day of February, 1999.

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CERTIFICATE OF DELIVERY

I, CATHERINE L. BEGIC, hereby certify that I have caused to be delivered eight copies of the foregoing to the Utah Court of Appeals, 230 South 500 East, Suite 400, Salt Lake City, Utah 84102, and four copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, Sixth Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this 22nd day of February, 1999.

Catherine L. Begic.
CATHERINE L. BEGIC

DELIVERED this _____ day of February, 1999.